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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1935.

No. [redacted] 35

SAMUEL B. SMITH,
Petitioner,

v.

A. B. HALL and L. C. HALL, d. b. a. HALL BROTHERS,
Respondents.

BRIEF FOR RESPONDENTS.

ARTHUR E. PAIGE,
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Counsel for Respondents.

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IN THE

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SAMUEL B. SMITH,

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v.

A. B. HALL and L. C. HALL, d. b. a. HALL BROTHERS,

Respondents.

BRIEF FOR RESPONDENTS.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Parties.

Petitioner trades as The Smith Incubator Company at 3108-3136 West 121st Street, Cleveland, Ohio, where he has a "Legal Department" under the supervision of his witness Joseph I. Taggart, occupied in prosecution of approximately four hundred separate suits involving the same subject matter as the suit against Hall Brothers,

and in manufacturing and distributing to 21,800 persons (on a mailing list including all persons engaged in the business of hatching chicks in the United States), a printed periodical entitled "Smith's Chickagrams", and circulars and letters warning the addressees against the purchase or use of any incubating apparatus other than that offered for sale by Petitioner's company.

These Respondents have a farm at Wallingford, Connecticut, where, before this litigation, they conducted what was said by Petitioner to be the largest chicken incubating business in the East. These Respondents have no connection whatever, either directly or indirectly, with James Manufacturing Company and Elmira Hatcheries, Incorporated, Respondents re No. 950. The Court below, as a matter of convenience, heard arguments in both cases upon the same day, to wit, February 14, 1936, and filed Opinions in both cases upon the same day, to wit, April 6, 1936. Whereupon, your Petitioner, Samuel B. Smith, mixed the subject matter of the two separate suits in the Court below in a single Petition for writ of certiorari.

Questions Involved.

The issues raised in the Court below were limited, at the trial, to the questions of validity and infringement of the claim 1 of Letters Patent of the United States No. 1,262,860 granted April 16, 1918, to the Petitioner, as assignor to The Buckeye Incubator Company, a corporation of Ohio, for Incubator, and alleged to have been re-assigned to the Petitioner subject to a license to, and an agreement with, the original patentee corporation. That claim is not for the incubator structure disclosed in said patent, for which other claims were granted, but is for a "method of hatching", and the charge of infringement of that claim is based upon the use by Respondents of various different incubator structures manufactured under Letters Patent of the United States Reissue No.

18,984 dated October 31, 1933, granted to John L. Robbins, of Edgewater, Colorado, for Incubator, (upon surrender of original Letters Patent No. 1,728,980 dated September 24, 1929), and purchased by Respondents from the manufacturer, The Robbins Incubator Company, of which the patentee Robbins is the president and proprietor. Said manufacturer has not appeared in this litigation.

"Prior Decisions of Other Courts."

The statement on page 3 of the Petition under that heading "These decisions in the Second Circuit are the first in which the Smith patent has been held invalid", is untrue.

The statement in line 10 et seq. on page 7, of said Petition, "In all suits excepting only the present ones, the validity of the patent has been sustained.", is untrue.

This Court was deceived by similar statements on behalf of Smith in the *Snow* and *Waxham* suits, cited on p. 3 of the present Petition. Several other Courts have been similarly deceived.

Respondents' Exhibit H, reproduced on printed page 355 of the Transcript of Record in the Hall case, is a certified copy of the decree of Judge J. L. Bodine, of the District Court for the District of New Jersey, in Buckeye Incubator Co. and Samuel B. Smith v. William F. Hillpot, 22 F. (2d) 855, from which Petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit, which decree was affirmed, as reported in 24 F. (2d) 341. That decree specifically states *"Second, that said patent does not disclose a successful method of operation and, consequently, method claims 1 and 2 thereof are invalid and void."* That fact is certainly within the knowledge of all of Counsel for Petitioner who endorsed and verified the present Petition. Moreover, Charles Neave, who endorsed said Petition as leading counsel, was

the leading counsel for Petitioner in prosecuting the appeal from that decision of Judge Bodine.

NOTE: It is significant that since that decree was affirmed by the United States Circuit Court of Appeals for the Third Circuit, as reported in 24 F. (2d) 341, the records of both that decree and the opinion upon which it was predicated, theretofore included in the archives of said District Court at Trenton, New Jersey, have been changed, by mutilation and partial obliteration, to eliminate the "Second" item of said decree, exemplified by said Defendants' Exhibit H; such change being in violation of R. S. Sec. 5403, Act of March 4, 1909.

Certainly, that violation was not of advantage to any one but Petitioner, as against the general public.

It is untrue, as stated in line 17 et seq. on page 3 of said Petition, that "The decisions against validity were based entirely upon alleged prior invention and prior use by one Milo Hastings."

The decisions in the Court below were based upon new evidence showing not only prior *invention* and prior *use* but also prior *sale* of the subject matter of Petitioner's claim 1, by Milo M. Hastings to Respondents' witness Walter B. Davis.

It is true, as stated in lines 3 to 7 inclusive on page 4 of the Petition, that "The Hastings prior use and publications purporting to describe it and a prior abandoned application for patent filed by Hastings were not in the records in the *Snow* and *Waxham* suits, but they have been known in the litigation on the Smith patent from its inception."

It is untrue, as stated in lines 4 to 6 inclusive on

page 6 of the Petition, that "The evidence in support of this Hastings defense was substantially the same in all of these cases in which that defense was urged."

Neither Milo M. Hastings, nor any other of Respondents' witnesses, testified in the cases against *Wolf* (cited on Petition p. 4) or *Stone* (cited on Petition p. 5).

It is true, as stated in line 26 et seq. on page 10 of Petitioner's Brief, that "The records in the Snow and Waxham suits did not include any of the Hastings publications or testimony about what was done by Hastings, so this Court did not pass on the specific matters of defense which were upheld by the Court of Appeals of the Second Circuit."

It is untrue, as stated in line 9 et seq. on page 12 of Petitioner's Brief that "The evidence dealing with the Hastings defense was in substance the same in these *Wolf* and *Cooley* cases as in the suits at bar against *Hall* and *James.*"

It is untrue, as stated in line 21 et seq. on page 15 of Petitioner's Brief, that "In summary, the records in these several suits relating to the Hastings defense were *the same in substance* as those before the Court of Appeals for the Second Circuit in the suits at bar;". (Italics ours.)

Such reiterated assertions on behalf of Petitioner, to the effect that the evidence in the instant Hall case as to the activities of Milo M. Hastings and his dealings with Walter B. Davis, at 23rd Street and Kings Highway, Brooklyn, New York, in 1910 and 1911, was substantially the same as in prior litigation, are untrue. Although the fact of Hastings' activities there was recognized in prior litigation, the legal aspect of said activities and the evidence of his contract with Davis concerning the same, as presented in the Hall case, are new and essentially different from what was presented in any prior litigation.

No such evidence was ever presented to any Court prior to the trial of the instant Hall case.

Smith's Claim 1.

"1. The method of hatching a plurality of eggs by arranging them at different levels in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture and applying a current of heated air, said current being created by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature, whereby the air will be vitalized, the moisture conserved and the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified."

COMPARISON OF SMITH'S CLAIM 1 WITH THE NEW EVIDENCE OF RESPONDENTS.

Elements of Structure Required by Said Claim.

(a) means for supporting eggs "at different levels" in

(b) "a closed chamber having"

(c) "restricted openings"

(d) "means other than variations of temperature" for "applying a current of heated air" throughout the chamber

(e) means for maintaining the air "at substantially the same temperature".

Each of said elements of structure required by the claim in suit was present in the incubator which Milo M. Hastings built and operated for Walter B. Davis at least as early as the Spring of the year 1911. The testimony adduced by Respondents with reference to said respective elements of structure is as follows:

(a) Testimony of Hastings (Trans. p. 78, f. 234); of Mr. Davis (Trans. p. 88, f. 264); of Mrs. Davis (Trans. p. 93, f. 277).

(b) Testimony of Hastings (Trans. p. 78, f. 234); of Mr. Davis (Trans. p. 87, f. 261); of Mrs. Davis (Trans. p. 93, f. 277).

(c) Testimony of Hastings (Trans. p. 80, f. 238); of Mr. Davis (Trans. p. 87, f. 261); of Mrs. Davis (Trans. p. 93, f. 277).

(d) Testimony of Hastings (Trans. p. 78, f. 234, 237); of Mr. Davis (Trans. p. 87, f. 260).

(e) Testimony of Hastings (Trans. p. 79, f. 237); of Mr. Davis (Trans. p. 87, f. 260-262).

Elements of Operation Required by Said Claim.

(f) "hatching a plurality of eggs"

(g) "escape of foul air"

(h) "applying a current of heated air"

(i) "maintain the air throughout the chamber at substantially the same temperature"

(j) maintaining in the same chamber *during the hatching*, eggs of "more advanced stage of incubation" with others "in a less advanced stage".

(k) carrying "units of heat" "from the eggs in the more advanced stage of incubation to those in a less advanced stage", *during the hatching*.

Each of said elements of operation required by the claim in suit was included in the method of hatching in which the Hastings incubator aforesaid was used in the Spring of 1911. The testimony adduced by Respondents

with reference to said respective elements of operation is as follows:

(f) Testimony of Hastings (Trans. p. 78, f. 232-235); of Mr. Davis (Trans. p. 88, f. 264); of Mrs. Davis (Trans. p. 92, f. 276-277).

(g) Testimony of Hastings (Trans. p. 80, f. 238); of Mr. Davis (Trans. p. 87, f. 261); of Mrs. Davis (Trans. p. 93, f. 277).

(h) Testimony of Hastings (Trans. p. 78, f. 234, 237); of Mr. Davis (Trans. p. 87, f. 260).

(i) Testimony of Hastings (Trans. p. 79, f. 237); of Mr. Davis (Trans. p. 87, f. 260-262).

(j) Testimony of Hastings (Trans. p. 78, f. 234, p. 80, f. 239); of Mr. Davis (Trans. p. 88, f. 264); of Mrs. Davis (Trans. p. 93, f. 277).

(k) Testimony of Hastings (Trans. p. 79, f. 237-239); of Mr. Davis (Trans. p. 87, f. 261, 264); of Mrs. Davis (Trans. p. 93, f. 277).

Therefore, regardless of the status of Hastings' application for Letters Patent, his reduction to practice of his invention disclosed in the Official record relating to that application, which reduction was effected prior to the filing of that application as proven by the testimony of Hastings and Mr. and Mrs. Davis, was a clear anticipation of the alleged invention of the Petitioner Smith defined in claim 1 of the patent in suit as interpreted by this Court.

The Claim in Suit is Invalid and Void In View of R. S. 4886.

The testimony of Hastings and Mr. and Mrs. Davis is clearly to the effect that the invention of the claim in suit was not only known to others in this country long

before the Petitioner Smith's alleged conception thereof, in the "Spring of 1914" but was in long continued public and successful commercial use, in this country, more than two years prior to Petitioner's application for the patent in suit, which was not filed until October 26, 1916.

DISCLOSURES IN THE UNITED STATES PATENT OFFICE RECORDS RE APPLICATION SERIAL NO. 624,885 FILED MAY 3, 1911, BY MILO HASTINGS FOR HATCHERY FOR THE EGGS OF DOMESTIC FOWL.

Defendants' Exhibit F (Trans. pp. 317-354) is a photographic reproduction of said records. Said application was filed by Milo M. Hastings during the time he was employed by Walter B. Davis in building and operating said incubator at Davis' poultry farm in Brooklyn, New York, beginning in December, 1910, and continuing in 1911. (See Trans. p. 78, f. 232-236, and p. 82, f. 245).

Consequently, that Patent Office record, Defendants' Exhibit F, is documentary evidence contemporaneous with the events alleged in the testimony of Respondents' three witnesses, Messrs. Hastings and Davis and Mrs. Davis. It discloses every feature of said Smith claim 1, as follows:

> (Trans. p. 321) "My invention is that of a hatchery in which I secure better ventilation and a more uniform temperature throughout the hatching chamber by substituting a forced draft for gravity drafts."
>
> (Trans. p. 322) "Ventilation I secure through cracks around the door of the hatching chamber or other small openings in any part of the air circuit. The air being constantly in motion, requires less rejuvenation than dead air."

(Trans. p. 342) "The problem has been to enable the incubating operations to be carried on continuously, if so desired, with eggs at all stages of development, and with all of a vast number of eggs subjected to the same temperature and atmospheric conditions best adapted for the development of the embryo."

(Trans. p. 343) "In practice it is found that with vast numbers of eggs assembled in a single compartment and with eggs at all stages of incubation but very little extraneous heat need be supplied, because the eggs in the later stages of development supply the necessary heat for the eggs in the earlier stages of development. In practice, however, a source of heat is always maintained in order to permit of proper regulation."

(Trans. p. 344) "The simple way in which applicant overcame the difficulty was through the provision of a mechanically operated air forcing means which would force a rapid circulation of air through the whole collection of eggs in the chamber and past the heater. The mechanical air forcing means is an essential factor, if heat is to be conserved and the conditions maintained uniform; for a circulation, which is due to differences in temperature in different portions of the circulatory system, as, for example, where the air is circulated by the effect of the heater in causing the heated air to rise and pass into or through the incubating chamber, will not answer for large collections of eggs."

(Trans. p. 346) "In the Hastings hatchery, a current of air is blown past each and every egg at the rate of thirty feet per minute and this rapidly moving air quickly bringing the temperature of the egg to approximately that of the air. This method

of heating keeps the temperature of the eggs in the advanced state of incubation down within a few degrees of that of the air, the exact difference being regulated at will by adjusting the speed of the fan. When properly adjusted the same blast of air used to heat fresh eggs does equally well for eggs in the advanced stages just as the same temperature of the body of the hen incubates the eggs at all stages of development, without recourse on the hen's part to the 'hatching fever', erroneously supposed to explain the higher temperature of eggs at a more advanced stage of development. Owing to this fact eggs at all stages may be handled simultaneously with uniformly good results."

"The operator of a Mechanical Draft plant may switch as much 'fresh' or outdoor air into this inner circulation as he is willing to heat. The inventor's practice is to use but a small portion of outdoor air except in cases of excessive humidity, when a large exchange of air is utilized as a simplest means of increasing evaporation."

(Trans. p. 347) "The introduction of moisture from the mist spray nozzles in the fan boxes to increase humidity, or running in outside air to decrease it as indicated by egg weights or air cell shrinkage is sufficient for ordinary hatching practice."

It appears from the first two paragraphs above quoted from that Patent Office record, which were in the original application as filed by Hastings, that he considered the most essential feature of his invention to be the circulation in an incubator chamber of a current of heated air by means other than variations in temperature. His attorneys Church & Church evidently agreed with him, for they made no effort to claim for him that feature in associa-

tion with eggs in staged incubation although not only that combination but its various advantages were clearly disclosed to them, as appears from the other quotations from that record, supra.

Nevertheless, the Official record relating to said application is unquestionable evidence that the invention described in claim 1 here in suit was not only clearly disclosed therein but "known to others" than Smith long before the latter's alleged date of conception thereof in the Spring of 1914; those others including Milo M. Hastings, the *five* witnesses to his application, to wit, Edgar Chambless and Jeannette Cohen (Trans. p. 322), J. P. Gannon (Trans. p. 323), Walter B. Davis, and Isabel E. Carkhuff (Trans. p. 354); his attorneys, Church & Church, and their employes who typed and compared the brief of Church & Church presented to the Board of Examiners-in-Chief; and the Primary Examiner, G. R. Ide, and his assistants who prepared and filed the "Examiner's Statement" (Trans. pp. 338-339), and the *three* Examiners-in-Chief.

In accordance with the reasoning of this Court in the *Snow* case (No. 102, October Term, 1934, Plaintiff's Exhibit 2, Trans. p. 145) Mr. Hastings' application should have been allowed and Letters Patent granted to him instead of to the Petitioner who adopted Hastings' invention after it was in public commercial use and articles concerning it widely published (Trans. p. 94, f. 280-282) in periodicals of the poultry industry of which there are numerous examples (pp. 296-300, 302-303) in the Transcript of Record of the *Cooley* case, of which Defendants' Exhibit F is a part. Of course, Hastings forfeited his right to obtain Letters Patent for the invention in question by abandoning his application, but, he abandoned it to the public generally and not to the Petitioner Samuel B. Smith exclusively.

Hastings was but twenty-seven years old and pre-

pared said application himself, without any previous experience in such matters. Consequently, the application papers which were filed in the Patent Office on April 25, 1911, were objected to as informal, and his application was not accepted for filing until he had corrected those informalities on May 3, 1911. It may be observed that the Official letters to Hastings during the prosecution of said application were addressed to him at the address of the Davis Poultry Farm where he was operating the incubator in accordance with the new evidence aforesaid.

In view of the argument in the paragraph beginning with line 10 on page 25 of Petitioner's Brief, to the effect that the disclosures in said application above quoted did not relate to the single closed chamber type of incubator Hastings had built for Davis, but related to the different type of incubator which Hastings later built at Muskogee which "was operated upon the principle of filling each of several chambers with eggs of the same stage of advancement in incubation, shifting the eggs to other chambers and *increasing the temperature of the chambers as the eggs advanced in maturity.*"; attention is called to the fact that on April 25, 1911, Hastings' Petition, part of said application, was filed in the Patent Office (Trans. p. 318) with a drawing which is reproduced on Trans. p. 354, showing a *single* closed egg hatching chamber A with restricted openings for ingress and egress of air; an electric fan B for forcibly circulating air in said chamber, and means for heating the air in said chamber including the flue C and the gas burner D, which is an incubator of the type Respondents' three witnesses Hastings, Davis, and Mrs. Davis testified was built at the Davis Farm. Therefore, Petitioner's argument aforesaid is absurd.

JUDGE MANTON'S COMMENT.

On page 405, line 28 et seq. of the Transcript of Record in the Hall case, Circuit Judge Manton states "An

article in Poultry Culture, describing the later operations of Hastings at Muskogee, said: '* * * the moving air adds to or removes heat from the eggs with great rapidity. Because of this fact, eggs at all stages can be placed in the same trays of the Hasting Hatchery with little or no injury. Mr. Hastings hatched several thousand eggs under such conditions in his Brooklyn (Davis) plant last year.' *This was published before any motive for so declaring could be possible.*" (Italics ours.)

That reference was to the issue of the publication "Poultry Culture" dated "February, 1912", identified as Vol. XV, No. 5, and the quoted text appears in the second paragraph, of the reproduction of said publication, on page 298 of the Transcript of Record in the *Cooley* case, which Record contains Respondents' "Defendants' Exhibit F."

That comment by Judge Manton is equally applicable to the statements appearing in the record of Hastings' application hereinbefore quoted, for they were all recorded in the Patent Office before the end of the year 1912, whereas, Petitioner Smith does not claim to have even conceived the invention of the patent in suit until the "Spring of 1914" and did not in fact file his application for that patent until October 26, 1916.

It is submitted that the unanimous decision of the three Judges of the Second Circuit which Petitioner seeks to have reviewed and set aside, was fully justified by such new evidence, and that because it was predicated upon evidence never before considered by any Court, there is no real conflict between that decision and the prior decisions cited in said Petition and Brief.

NEW EVIDENCE OF INSUFFICIENCY OF DISCLOSURE IN THE SMITH PATENT 1,262,860.

Said patent does not include sufficient information to enable anyone to effect the "method of hatching" contemplated in claim 1, without experimentation to determine to what degree the air circulated in the incubator must be heated to effect such hatching. The Petitioner Smith himself was uncertain as to that, for, on page 2, line 8; page 2, line 21; and page 5, line 9 of his original specification as filed October 26, 1916, (a copy of which is included between pages 421 to 465 inclusive, in the *Cooley* Transcript of Record containing the present Defendants' Exhibit F), Smith stated the maximum temperature permissible with his method of hatching to be 106° F.; but, by the amendment which is Paper No. 3 filed March 6, 1917, nearly five months after his application was filed, Smith changed that limit to 105° F. *Both were wrong. The highest temperature permissible is 99° F.*

In his original specification, Smith claimed that his invention provided "means to *heat the eggs uniformly*". See particularly original claim 11. Smith added to that, by amendment filed March 6, 1917, the statement which appears in line 48 et seq. on page 1 of the patent in suit "It is manifest that the temperature will remain practically the same throughout the column of eggs". *Neither statement is true. Both are contradicted by* Petitioner's witness Taggart (Trans. p. 69, f. 207-209) with reference to Plaintiff's Exhibit 13 (Trans. p. 180).

In Paper No. 4 which is dated March 24, 1917, the Official Examiner objected "The temperature of the air is not the same throughout the column, since the temperature is raised by the lower trays of eggs and diminished by the upper, so that the temperature is higher part way up the tier at either the top or the bottom." However, Smith failed to correct either of his erroneous statements above quoted.

The only information, in said patent in suit, as to the temperature *of the air* to be maintained during the method of hatching of Petitioner's claim 1, is in the statement in line 40 et seq. on page 1 of said patent, as follows:

> "The temperature of circulating air should be such as will prevent the eggs in the early stage of incubation from falling below 100°."

That statement is also untrue for, as admitted by Petitioner's witness Taggart (Trans. p. 70, f. 210-211), the air must be at a temperature of at least 100½° F., perhaps 100¾° F., to prevent the eggs in the early stage of incubation from falling below 100° F., and, as admitted by Taggart (Trans. p. 72, f. 214), "if you subjected eggs to such a temperature of air that they do not fall below 100° F. in the early stage or first ten days, *it would be fatal to practically all of the eggs.* That was my discovery. In the Waxham case I testified that '*Even with the proper humidity, 99-1/4° is too hot for a Smith incubator*'." (Italics ours.)

Therefore, it is unquestionable, in view of the testimony of the Petitioner's own witness Taggart, that the success or failure of the method of hatching, subject matter of claim 1 in suit, is dependent upon precise determination and maintenance of the critical correct temperature of the air less than 99¼° F. in the closed chamber where incubation is being effected, but the patent in suit not only fails to afford that information, but clearly and specifically directs the performance of that method under different conditions at a higher temperature which said witness Taggart admits would be "fatal to practically all of the eggs". The reasonable inference is that the Petitioner Smith himself did not know, even as late as the issuance of his patent on April 16, 1918, that an air temperature of

99° F. *must be maintained* in the "closed chamber" to effect the method of hatching of claim 1 in suit.

That reasonable inference is made a certainty by the testimony of Petitioner's witness Taggart (Trans. p. 72, f. 216) that *it was not until the year 192:* that *he, Taggart,* by a series of experiments and tests, determined and disclosed to Smith incubator users that the teaching of the patent in suit was erroneous, and that the maximum temperature of the air which it was safe to use in the method of hatching of claim 1 in suit was but 99° F. As he testified (Trans. p. 72, f. 214) "Even with the proper humidity, 99¼° is too hot."

It appears from the foregoing comparison of the disclosures of the patent in suit with the scientific facts to which Petitioner's witness Taggart testified, that Smith not only failed to disclose the correct use of the incubator structures disclosed in his patent, but gave clear and specific instructions for use thereof which are not only misleading but fatally defective.

Consequently, Petitioner's method claim 1 is invalid and void because his disclosures in the patent in suit as to the operation of the *only incubator* therein shown are not only insufficient to effect the method of hatching contemplated in said claim, but would prevent any *hatching* of eggs treated in the manner prescribed in the patent in suit.

PETITIONER'S MISREPRESENTATIONS OF SCIENTIFIC FACTS RELEVANT TO SAID CLAIM 1.

Petitioner's Exhibit 13 (Trans. p. 180) is a "Graph Showing Development of Heat Units in Incubation", made by his expert witness Joseph I. Taggart, whose initials appear adjoining the date "12/22/28" thereon. It presents a fraction of truth, so as to be grossly misleading to the numerous Courts to which it has been presented since that date, with glib statements that the "heat units"

referred to in said "Graph" are calories, of which "(.252 calories equal one B.T.U.)". See the first paragraph at the bottom of said "Graph".

The *blue* area on said "Graph" purports to represent the heat required, during the first ten days of incubation, to raise eggs to, and keep them at, the "incubating temperature" referred to in the legends thereon, which temperature is represented by the single horizontal line extending at the *top* of the *blue* area and *bottom* of the *red* area. The *red* area represents the "excess heat" given off by such eggs during the last eleven days of incubation.

The red area is more than three times greater than the blue, *misrepresenting* that the eggs *generate* more than three times as much heat as they absorb during the twenty-one days of incubation.

Under cross-examination Taggart admitted (Trans. p. 69, f. 207; p. 70, f. 208) that said "incubating temperature" must be neither more nor less than ninety-nine degrees Fahrenheit. That the rise in temperature from the *tenth* to the *eighteenth* day is but one degree Fahrenheit and that the *highest* temperature of the eggs is not attained until the *twenty-first* day.

Consequently, the vertical distance of 1.6 inches from the bottom of the "Red curve" to where the "Black Curve" crosses the vertical "18" day line on said "Graph" represents but *one degree F.*, and the *bottom* line of said "Graph" represents an *initial egg temperature* of 98.75° F.!

On the contrary, it is a matter of common knowledge that whether the eggs are gathered from a barn floor, freight station platform, or cold storage refrigerator; their *initial* temperature is more than 50° F. *lower* than 98.75° F.

Therefore, to present the *whole* truth the *blue* area of said "Graph" should be extended, vertically downward, more than *eighty inches* (50 times 1.6 inches) below

the bottom line of said "Graph", to indicate the *actual* initial temperature of the eggs submitted to incubation.

When that is done the truth appears that the *quantity* of heat *generated* by the eggs and fully manifested by the *red* area of said "Graph" is but a *minute and negligible fraction* of the whole quantity of heat required to hatch eggs by the method of said claim 1, and the Petitioner's propaganda to the contrary urged for the past *19* years, first, upon the Commissioner of Patents, to obtain said Letters Patent, and, later, upon prospective customers, and, finally, upon numerous Courts, including this Court, was and is false and fraudulent.

COMPARATIVE INEFFICIENCY OF PETITIONER'S METHOD.

In view of Petitioner's propaganda presented of record in this Hall case to the effect that the method of hatching of claim I in suit is highly efficient; attention is called to the fact that in the trial of Samuel B. Smith v. F. J. LeMieux, La Plant Hatcheries, at Milwaukee, Wisconsin, on May 9, 1935, witnesses subpoenæd by Petitioner disclosed that use of said "method of hatching" during the hatching season of the year 1935, resulted in hatching not more than 35% of all of the eggs set. That testimony related to the use of said method in Robbins incubators of a form of which Petitioner complains in this case, but, it is a matter of common knowledge to those in the poultry industry that the same percentage of hatching resulted from the practice of Petitioner's method of hatching in incubators manufactured and sold by or for him marked with the number and date of the patent in suit.

In contrast: It should be noted that since the Fall of the year 1930 the only method of hatching used by Respondents was effected in a hatching chamber containing only eggs which have reached the eighteenth day of their

incubation (Trans. p. 63, f. 189), which hatching chamber is separate and apart from any chamber containing eggs in any earlier stage of incubation. (Trans. p. 95, ff. 284-285). The evidence (Trans. p. 96, f. 286) that the use of that separate hatching method by Respondents has enabled them to hatch between 85% and 90% of the eggs set, was undisputed.

THIS COURT DECEIVED.

In view of the use of that separate hatching method not only by these Respondents but by many other defendants named in suits by your Petitioner; this Court was deceived to the erroneous belief, (set forth in Trans. p. 148, f. 444) "the eggs passed into the more advanced stages of incubation, *reaching their highest temperature about the seventeenth day*" (italics ours). That statement is contradicted by the admissions of Petitioner's witness Taggart (Trans. p. 70, f. 208) in his testimony re Plaintiff's Exhibit 13 (Trans. p. 180), and clearly and specifically to the effect that even at the end of the *eighteenth* day the eggs have only reached a temperature of 100° F., whereas, the *highest* temperature, of 105° F., is not reached until the twenty-first day, as shown by said Exhibit 13.

FRANCIS W. ORVIS, EDITOR OF POULTRY DIGEST.

In line 1 et seq. on page 29 of the Brief for Petitioner it is stated:

> "Important practical witnesses who must have been informed on the subject and who were available, such as Orvis, the editor of a poultry magazine to whom Hastings is alleged to have disclosed his invention, Miller, the manager of the Davis farm, and others, were not called nor was their absence accounted for."

Therefore, we note that we informed the Court below that we made a diligent search for both Orvis and Miller with the result that we were credibly informed that both were dead.

It was not until Petitioner's Counsel Albert L. Ely, Edmond M. Bartholow, and Geo. C. McConnaughey filed their Brief on appeal in the United States Circuit Court of Appeals for the Second Circuit that they disclosed in line 3 et seq. on page 16 thereof "As a matter of fact Orvis is alive today and lives in Hackensack, N. J."

Why did not Petitioner's Counsel call Orvis as a witness to contradict the testimony of Respondents' three witnesses Milo M. Hastings, Walter B. Davis, and Mrs. Davis? The answer is that if called Orvis would have corroborated the testimony of said witnesses, as is clearly indicated by the letter of "Francis W. Orvis, Editor, Poultry Digest" dated *May 20, 1911*, reproduced on page 254 of the Cooley record including your Respondents' Exhibit F, wherein Orvis described the incubator which he had inspected at the farm of Walter B. Davis, thus:

> "A small room was so arranged that with the various devices of Mr. Hastings', heat, moisture and ventilation were under perfect control and the eggs and chicks were as easily accessible as in the opening of a bureau drawer. The little fellows were coming out and new eggs added daily, making a continuous hatching proposition under absolute control of the operator.
>
> "The percentage of eggs hatched the day the writer visited the plant was somewhat better than obtained from the same grade of eggs hatched in ordinary incubators running at the same time and under the same conditions."

What Orvis thus described was certainly "staged incubation".

PETITIONER HAS CERTAINLY KNOWN FOR AT LEAST 13 YEARS THAT HE WAS NOT THE FIRST INVENTOR OF THE SUBJECT MATTER OF SAID CLAIM 1.

Counsel for Petitioner stated to Judge Hincks at the trial of the Hall case, that the Petitioner had made an investigation and ascertained the facts concerning the building and operation of an incubator for Walter B. Davis by Milo M. Hastings in the years 1910 and 1911; when that matter was first mentioned in defense of a charge of infringement by Petitioner. Indeed any statement that Petitioner had *not* made such investigation would have been incredible. Consequently, Petitioner must have known, at least as early as the trial of *Buckeye Incubator Co. v. Wolf*, 291 F. 253, (D. C. Ohio, 1923), that he was not the first inventor of the subject matter of claim 1 of the Smith patent 1,262,860. Nevertheless, Petitioner has continued to use said Letters Patent as an instrument of intimidation and oppression of the public, in disregard of relevant laws, rules, and the decisions of this Court. For example, in the U. S. District Court for the District of New Jersey, on *May 4, 1935*, Petitioner filed three Bills in *Equity*, respectively No. 5113 against Ernest Grove, No. 5114 against Mary A. Griscom, and No. 5118 against Glenn T. Sponenbergh, d. b. a. Glenn T. Sponenbergh Hatcheries, charging infringement of and asking for *injunctions* under said Smith patent 1,262,860 which had expired on *April 16, 1935*, and in disregard of the fact that such procedure had been condemned in the decision of this Court in *Root v. Railway Co.*, 105 U. S. 189.

In the light of even the few facts of record, briefly reviewed supra, our imagination is not elastic enough to attribute to Petitioner Smith, the "clean hands" said to

be necessary for *any* Petitioner seeking the favor of any Court in Equity.

Respectfully submitted,

HALL BROTHERS,
By
ARTHUR E. PAIGE,
FRANK E. PAIGE.